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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1954

No. 530

DANTAN GEORGE REA, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (R. 2-7)[1] has not been reported and is set out as Appendix A. The opinion of the United States District Court for the District of New Mexico is unreported and is contained in the Record as printed for the use of the Court of Appeals (R. 7-8).

[1] This reference is to the transcript of record of the proceedings in the United States Court of Appeals for the Tenth Circuit. All other references, unless otherwise indicated, are to the transcript of record of the proceedings in the trial court.

JURISDICTION

The judgment of the Court of Appeals was entered on December 23, 1954 (R. 2)[2].

The jurisdiction of this Court is conferred by 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the Fourth and Fifth Amendments of the Constitution prohibit the use of evidence, seized by an agent of the United States pursuant to a void Federal search warrant and suppressed by a United States District Court, in a state criminal trial where the evidence remains in the custody of the United States and in the possession of its agents.

2. Whether the Fourth and Fifth Amendments of the Constitution prohibit an agent of the United States from testifying in a state criminal trial as to evidence obtained by him in his capacity as Federal agent in the course of a search adjudged by a United States District Court to be in violation of the Fourth Amendment.

3. Whether a prior order of a United States District Court suppressing illegally obtained evidence in any criminal proceeding, including the criminal action then pending in such court, and Rule 41(e) of the Federal Rules of Criminal Procedure, apply to the use of such evidence in a state criminal trial.

PROVISIONS OF THE CONSTITUTION AND STATUTES INVOLVED

Fourth Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall

[2]Record of Proceedings in the Court of Appeals.

issue, but upon probable cause, supported by oath or affirmation, and particularly described the place to be searched, and the persons or things to be seized.

Fifth Amendment:

No person * * * shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty or property without due process of law; * * *

Rule 41 (e), Federal Rules of Criminal Procedure (18 U.S.C., Section 3771):

Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. * * *.

STATEMENT OF THE CASE

Petitioner was indicted in the United States District Court for the District of New Mexico on September 12, 1953, for acquiring marihuana on August 13, 1953, without having paid the transfer tax required by law, in violation of Title 26, U.S.C. Section 2593 (a), 1939 Internal Revenue Code (R. 2). Following a plea of not guilty

(R. 2-3), petitioner moved that the search warrant issued by the United States Commissioner to Federal Narcotics Agent Salter be quashed, and that all property seized pursuant to said warrant from petitioner's home in Albuquerque, New Mexico, be suppressed as evidence against petitioner "in any criminal proceeding including the above-entitled action" (R. 3-4). The grounds relied upon were that the search and seizure were "in violation of his rights under the Fourth Amendment to the Constitution" (R. 4). After hearing, and on June 18, 1954, the United States District Court for the District of New Mexico granted the motion in the form in which it was made (R. 4). Thereupon, the United States moved to dismiss the indictment, and it was dismissed (R. 4-5).

On the same day that the District Court suppressed the evidence, Narcotics Agent Salter with knowledge of or in anticipation of the District Court's Action, went before a Justice of the Peace of New Mexico, made an affidavit that petitioner had been in possession of marihuana on August 13, 1953; and procured the issuance of a warrant for petitioner's arrest for possession of marihuana in violation of Section 71-636, New Mexico Statutes Anno., 1941 Comp. (R. 6). Petitioner was arrested on the charge made by the Federal agent and is awaiting trial (R. 7). It was stipulated by the United States Attorney that Narcotics Agent Salter "is about to prosecute for the same offense, in the State Court with the same evidence" as was suppressed (Supp. R. 3). The suppressed evidence remains in the physical possession of the Narcotics Agent, who holds it in his capacity as a Federal officer and pursuant to regulations and laws of the United States (Supp. R. 5; R. 6). The knowledge that formed the basis of the state charge sworn to by the Federal Agent was obtained solely as a result of his illegal search and seizure (R. 7).

Based on the foregoing, petitioner promptly made a motion on June 21, 1954, that an order to show cause be

issued and served upon Narcotics Agent Salter why he should not be held in contempt for violating the order of suppression, and forbidding and enjoining him from testifying "as to the existence, character, possession of, or facts about the aforesaid suppressed evidence, and from transferring said evidence out of the legal custody of the United States" (R. 5-6). The motion sought such further order as was necessary to protect petitioner's constitutional rights and to enforce the previous order of suppression (R. 6). To determine the existence of the grounds relied upon by petitioner, a hearing was requested (R. 6).

Agent Salter and the United States Attorney appeared at a hearing on the matter (Supp. R. 3). After submission of briefs, the District Court wrote an opinion in which he noted the absence of any precedent in the United States District Courts for the precise question presented, but denied in its entirety the relief sought in petitioner's motion (R. 8). The grounds of his decision were that neither the Fourth Amendment nor Rule 41 of the Federal Rules of Criminal Procedure affected the use in a state court of evidence previously suppressed in Federal court (R. 8). Accordingly, the District Court, on July 2, 1954, issued an order denying petitioner's motion and purporting to limit his previous order of suppression to use of evidence in the United States District Court of New Mexico only (R. 9). On July 12, 1954, petitioner filed a timely notice of appeal (R. 9-10).

The basis for federal jurisdiction in the trial court may be found in 18 U.S.C. Section 3231, Rule 41(e) of the Federal Rules of Criminal Procedure, at 18 U.S.C. Section 3771, 18 U.S.C., Section 401, 42 U.S.C., Section 1988, and 28 U.S.C., Section 2463.

The United States Court of Appeals for the Tenth Circuit affirmed on the grounds that the Fourth Amendment does not prohibit the use of unconstitutionally obtained evidence in any court, State or Federal, and that

the evidentiary rule of exclusion in Federal courts is solely a matter of Federal judicial policy, and hence inapplicable to a state trial. It held that evidence obtained in violation of the Fourth Amendment by the Federal government could be used in a State trial without violating any right guaranteed the petitioner under the Federal Constitution, its laws, or its rules of evidence. Alternatively, it upheld the lower court's decision as an exercise of discretion, controlled by *Stefanelli v. Minard*, 342 U.S. 117, in that a prohibition upon a Federal officer would interfere with a state prosecution.

ARGUMENT

I.

Whether the Federal Government, through Its Agents, May Make Available to a State Court for a Criminal Prosecution, Physical and Testimonial Evidence That Has Been Suppressed as in Violation of the Fourth Amendment, Is an Important Constitutional Question Which Should Be Settled by This Court.

The evidence in question was seized and detained in the enforcement of a revenue law of the United States, namely, 26 U.S.C. Sections 2590-2596, 1939 Internal Revenue Code, and was therefore "deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof." 28 U.S.C., Section 2463. As the seizure was made in New Mexico, and the property seized remained in that state in the physical possession of the Federal officer, the District Court of New Mexico possessed jurisdiction over it. *Raffaele v. Granger*, 196 F. 2d 620, 623. See also Rule 41(e), Federal Rules of Criminal Procedure. Thus, the disposition or use of the illegally seized evidence is controlled by Federal law, that is, the Federal Constitution and Federal Statutes, and cannot be reached by the subpoena power of a state court unless permitted by the Fed-

eral court. Without the concurrence and permission of Federal authority, the state courts cannot reach the evidence.

The constitutional issue presented therefore is whether the Federal Government is barred by the Fourth and Fifth Amendment from permitting the use by a state court of evidence which it admittedly cannot use in its own courts under the doctrine of *Weeks v. United States*, 232 U.S. 383.

The question is important in the enforcement of rights guaranteed under the Fourth and Fifth Amendments. The remedy considered essential to compelling observance of constitutional rights *by Federal officers* has been to deprive the Government of the right to use the evidence so obtained, damages being considered wholly inadequate protection. See *Wolf v. Colorado*, 338 U.S. 25. "The public opinion of a community can far more effectively be exerted against oppressive conduct on the part of police directly responsible to the community itself than can local opinion, sporadically aroused, be brought to bear upon remote authority pervasively exerted throughout the country." *Wolf v. Colorado, supra*, at pp. 32-33. The inability of Federal law enforcement officers to profit by an unconstitutional search and seizure or by a coerced confession has been the greatest assurance of a United States citizen that his rights will be observed by Federal law-enforcement officers. If Federal law-enforcement officers may exert the power of the Government to invade one's home, and the Federal Government then be free to hand the suppressed fruits of the search and seizure on a silver platter to state courts, the deterrent to observe Federal rights is seriously impaired. This is particularly true where the areas of Federal and state jurisdiction so frequently overlap, as in narcotics violations, kidnapping, transportation of stolen property, national bank robberies, blackmail, income tax evasion, liquor law violations, gambling and other offenses too numerous to mention. The

doctrine that the Federal Government has the right to make use of evidence illegally secured and so determined and ordered suppressed by a Federal Court for a state prosecution would be a direct incentive to treat with indifference, if not outright hostility, Federally-protected rights, secure in the knowledge that, if the Federal Government could not prosecute, a state government could, in those cases where the crime has both a Federal and state aspect.

What has been said as to the protection afforded to Constitutional rights by prohibiting *any* use of the evidence, applies with equal force to testimonial evidence as to physical evidence. To permit Federal officers to use their knowledge thus gained to convict one in state courts would encourage a violation of the right against an unreasonable search and seizure.

The point of the matter is that evidence illegally secured by the Federal officer was suppressed by the United States District Court as being violative of the Fourth Amendment and the invading officer who took an oath to support and defend the Constitution, with knowledge of the suppression or in anticipation of it, not only instituted the State action but plans to make the suppressed evidence available to the State Court and to testify concerning it.

The exact question presented has not been decided by this Court. The Court of Appeals invoked *Stefanelli v. Minard*, 342 U.S. 117, in support of its position, stating that "while here the evidence was obtained by a federal officer in violation of the Fourth Amendment, we think the reasoning of that case has force and applicability here." The *Stefanelli* case involved a refusal to enjoin state officials in a state prosecution, and to sanction "the active intrusion of the federal courts in the administration of the criminal law for the prosecution of crimes solely within the power of the States." Here there is no

interference with any state officer. The power of the Federal Court would be exerted solely on the Federal Government and its agents, as it is when the latter are ordered to return seized property that is not contraband. See *Go-Bart Co. v. United States*, 282 U.S. 344.

If suppression of evidence in the hands of Federal agents is an interference with state prosecutions, then so is a return of the property where the state might desire to subpoena it for use in trial. Thus, if the *Stefanelli* case has been correctly applied by the lower court to a case where evidence has been suppressed, by holding that it is an interference with state prosecutions not to make *suppressed* evidence available, then logic demands that it be applied in the ordinary case where a *return* of property is ordered. An aggrieved person's right to a return of illegally seized property, as well as a suppression, would be subject to prior rights of a state court to reach the property in the hands of the United States. This is so because the Fourth Amendment extends the same protection to contraband as to ordinary property. *Trupiano v. United States*, 334 U.S. 699. The doctrine that an individual's right to a return and suppression of evidence is limited by the right of a state to obtain the same evidence for a state prosecution is both a novel proposition and a dangerous inroad on Constitutional rights, which should be reviewed by this Court.

II.

The Rationale of the Lower Court Is in Conflict with Applicable Decisions of This Court.

The construction by the Court of Appeals of the Fourth Amendment, of Rule 41(e), and of the order suppressing the evidence "in any criminal proceeding including the above-entitled action," was that they involved only a rule of evidence applicable to Federal criminal trials, imposed as a matter of Federal judicial policy. If that premise is granted, the conclusion reached by the

lower court might follow. Petitioner submits, however, the foundation of the decision is erroneous and in conflict with applicable decisions of this Court.

The following excerpt discloses the basis of the lower court's decision:

> "The receipt of evidence in trials in federal courts, resulting from unlawful searches and seizures by federal officers or agents, is not a violation of rights guaranteed by the Fourth Amendment."

If the Constitution does not forbid the Federal Government to use evidence illegally seized in its own courts, then the Court reasoned that *a fortiori* it does not prohibit the Federal Government's making such evidence available for use by a state court.

In support of this major premise, *Weeks v. United States*, 232 U.S. 383 and *Wolf v. Colorado*, 338 U.S. 25, and cases there cited, were relied upon. The *Weeks* case is quite to the contrary. Its holding is as follows (at p. 398):

> "We therefore reach the conclusion that the letters in question were taken from the house of the accused by an official of the United States acting under color of his office in direct violation of the constitutional rights of the defendant; that having made a seasonable application for their return, which was heard and passed upon by the court, *there was involved in the order refusing the application a denial of the constitutional rights of the accused, and that the court should have restored these letters to the accused.*" (Emphasis added.)

From the foregoing it appears that the order made before trial constituted a denial of the aggrieved person's rights under the Fourth Amendment. Had there never been a trial, the Fourth Amendment would have entitled the victim to a return of his property, *Go-Bart Co. vs.*

United States, 282 U.S. 344, and the refusal to return the papers would infringe the Fourth Amendment even if the defendant, at trial, were not convicted, or the evidence were not used against him. If, as held by the lower court, suppression of seized properties is solely a right conferred by a Federal evidentiary policy, then there could be no right apart from that policy to have property returned and suppressed *unless it is known that there will be a prosecution at which it can become evidence.* Yet this Court has recognized such a right to a return. *Go-Bart Co. v. United States, supra; Burdeau v. McDowell*, 256 U.S. 465. See also Rule 41(e) permitting the suppression and return of evidence in the District of seizure even where prosecution will be elsewhere, if at all. *Weinberg v. United States*, 126 F. 2d 1004 (C.A. 2d).

That the prohibition against use of the evidence is constitutional, may be gathered from the cogent language employed in the *Weeks* case (at p. 393):

> "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."

In *Wolf v. Colorado, supra*, Mr. Justice Frankfurter said (at p. 28):

> "In *Weeks v. United States, supra*, this Court held that in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure."

See also *Silverthorne Lumber Company v. United States*, 251 U.S. 385, in which Mr. Justice Holmes said (at p. 392):

"The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court *but that it shall not be used at all.*" (Emphasis added.)

The effect of the lower court's decision is to remove all restrictions on the Federal Government's use of illegally obtained evidence except use in its own courts. This interpretation limits the protection of the Fourth Amendment solely to instances where the Fifth is also involved, and strips it of any independent vitality. "The basic premise of the prohibition against searches is not protection against self-incrimination; it was the common law right of a man to privacy in his home, a right which is one of the indispensable ultimate essentials of our concept of civilization." *District of Columbia v. Little*, 85 U.S. App. D.C. 242, 246, 178 F. 2d 13, affirmed (on other grounds), 339 U.S. 1. In the last named case, the Court specifically rejected the argument advanced by the Government "that the Fourth Amendment provision regarding searches is premised upon and limited by the Fifth Amendment provision regarding self-incrimination."

Petitioner submits that the decision of the lower court is in direct conflict with the principle of *Silverthorne Lumber Company v. United States*, *supra*, forbidding not just the use of illegally obtained evidence before the Federal court, but requiring of the Federal Government "that it shall not be used at all." The *rationale* of all of this Court's decisions requiring a return (where no contraband is involved) and suppression of evidence unconstitutionally seized (even where contraband is involved, *Trupiano v. United States*, *supra*) is that the aggrieved party should be placed in the *status quo* occupied by him, before the search and seizure, and that the Federal Government make *no* use of its ill-gotten evidence.

The contention that a suit for damages adequately

protected such a person's rights against invasion by the Federal Government was laid to rest with the *Weeks* case. Yet that is the remedy to which this petitioner would be left since the courts of New Mexico will convict on evidence that is unconstitutionally obtained. *State v. Dillon*, 34 N.M. 366, 281 Pac. 474. Hence, the petitioner would not be restored to the *status quo*, as were the persons in other search and seizure cases before this Court. See *Weeks v. United States*, *supra*; *Silverthorne Lumber Company v. United States*, *supra*; *Go-Bart Co. v. United States*, supra; *Gouled v. United States*, 255 U.S. 298; *Amos v. United States*, 255 U.S. 313.

In addition, the United States here violates the fundamental principle of seeking to profit by its own wrong, and maintains that, by its wrong it acquired a right to make use of what it never should have acquired initially. See *United States v. Coplan*, 185 F. 2d 629, 640 (C.A. 2nd), certiorari denied, 342 U.S. 920, for a statement of the principle prohibiting the Government to profit by using in any way what "would not have been found, if officials had not violated the laws designed to deny them access to it." Whether the fruits of the unconstitutional seizure are made use of by the Federal Government in its own courts or in the courts of the State of New Mexico, it is the United States which is the means and instrumentality by which the evidence is made available to the State.

In *Lustig v. United States*, 338 U.S. 74, 79, this Court made the test of whether the Federal Government had participated in an illegal search the "actuality of a share by a Federal official in the total enterprise." Here a Federal Official, ten months after obtaining the evidence, uses it to initiate a state prosecution, and proposes to furnish, from the custody of the Federal Government, the sole means of a state conviction. To the extent that the evidence would not have been uncovered but for the Federal Government's wrong, and would not be now available but for the action in supplying the sole means to initiate

and prosecute the state criminal action, there is certainly "a share by a Federal official in the total enterprise" of prosecuting.

The United States in both lower courts has therefore asserted a right to make use of the fruit of its wrong, contrary to the principle of the *Silvertharne* case. Thus, the issue squarely presented for review by this Court is whether the sole consequence to the Government of an illegal search and seizure is exclusion under an evidentiary rule in Federal courts, imposed as a matter of judicial policy in Federal court trials, or whether it is a Constitutional prohibition against the Federal Government's use of the evidence for all purposes. It is submitted that the position of the lower court on this issue was in direct conflict with the rationale and reasoning of the opinions of this Court, and therefore should be reviewed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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APPENDIX A

[Opinion.]

HUXMAN, Circuit Judge.

An indictment was filed against appellant, Dantan George Rea, in the United States District Court for the District of New Mexico, charging him with unlawfully acquiring marihuana without having paid the transfer tax required by law, in violation of 26 U.S.C.A. § 2593 (a). The evidence upon which the prosecution was predicated was obtained as the result of an illegal search pursuant to a void search warrant. After a plea of not guilty, appellant moved that the search warrant issued and all property seized pursuant thereto be suppressed as evidence against him "in any criminal proceeding including the above entitled action." The trial court suppressed the evidence with the result that the district attorney, being deprived of the use of his evidence, at the same time moved for a dismissal of the action. Such an order was entered by the court. Thereafter, on August 13, 1953, Narcotics Agent Salter swore to a complaint before a Justice of the Peace of New Mexico, stating that appellant was in possession of marihuana, in violation of Section 71-636 N. M. S. A., 1941, Compiled. Appellant was arrested on the warrant and complaint issued and he is now awaiting trial in the State Court of New Mexico. The case against him there is presumably predicated on the testimony of Narcotics Agent Salter and the evidence seized by him.

On June 21, 1954, appellant filed a motion in the federal court for a contempt show cause order to be issued against Salter, to show cause why he should not be held in contempt of court and to enjoin him from testifying in the state court action with respect to the narcotics obtained by him as a result of his illegal search, and that if such evidence had been already transferred out of the

custody of the United States to direct him to immediately reacquire custody and possession in the name of the United States, and to destroy the evidence or transfer it to other agents of the United States. The grounds of this motion were that the evidence had been illegally obtained and that the federal court should enjoin its use in the state tribunal. The trial court upon hearing and briefs submitted entered an order denying the relief sought on the ground that the suppression of evidence in a federal court under Rule 41 of the Federal Rules of Criminal Procedure and the Fourth Amendment to the Constitution of the United States applies only to proceedings in United States Courts and does not govern the use of that evidence in a state court. This appeal challenges the correctness of that ruling.

By his original motion appellant sought two things; first, the suppression of the evidence and the order of the court denying its use as evidence in any prosecution against him and, second, the order of the court directing the disposal of the property in question. The court entered an order suppressing the evidence but made no order with respect to the seized property.

Rule 41 (e) of the Federal Rules of Criminal Procedure empowers the court to suppress evidence obtained in violation of one's rights under the Fourth Amendment to the Constitution and to order its return, if it is of such a nature that it can be lawfully returned. This, being marijuana, was contraband and could not be lawfully returned to appellant. When Rea obtained an order suppressing the use of the marijuana as evidence against him and the district attorney dismissed the charge, the case against him came to an end. At that point there was nothing pending against him in any court. What he sought thereafter when the state case was filed against him was an order of the district court, enjoining Salter from testifying in the state action, and a further order

with respect to the disposition of the evidence which in effect would enjoin its production as evidence in the state court.

The receipt of evidence in trials in federal courts, resulting from unlawful searches and seizures by federal officers or agents, is not a violation of rights guaranteed by the Fourth Amendment. The invasion of the right to sanctity and privacy of the home is complete when the unlawful search and seizure is consummated. The legal penalties which flow from such violation and which may be inflicted then become absolute, and denying the right to receive evidence thus obtained thereafter in a trial in the federal court is no part of such penalties, either under the Fourth Amendment or under any law of Congress. Congress no doubt could pass a law prohibiting the use of such evidence in federal courts but this it has not done. In the absence of such a statute, the denial of the right to use the same flows from a rule of evidence fashioned by the federal courts.[1] The rule is well stated in Shinyu Noro v. United States, 148 F. (2d) 696, as follows:

"Neither the Constitution nor any statute in terms prohibits the use of the truth, even though unlawfully discovered, as evidence in the prosecution of a crime; but it is a federal judicial policy not to allow the agents and officers of the United States to break the law themselves and then use information so acquired to prosecute others."

The prohibition against the use of such evidence is limited to trials in the federal courts and there only when it was unlawfully obtained by federal officers or agents. It has consistently been held that evidence obtained by state officers in violation of the Fourth Amendment may

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[1] Weeks v. United States, 232 U. S. 383;
Wolf v. Colorado, 338 U. S. 25, and cases there cited.

be received in trials in federal courts[2] and that evidence unlawfully obtained by federal officers may be used in state trials, when not in contravention of state law.[3]

We cannot agree that the relief sought is merely incidental to the order of suppression. While the motion for suppression sought the suppression of the evidence "in any criminal proceeding including the above entitled action", we think it must be construed as being limited to actions by the federal government in federal courts. That is the interpretation placed upon the order of suppression by the judge who entered it, when in denying relief under this motion he stated that the motion to suppress was sustained "only insofar as the Court therein and thereby prohibited the introduction of the evidence thereby obtained by Agent Jack Salter through an illegal federal search warrant in this court and *had no bearing whatsoever on the use of said evidence in the State Courts of New Mexico, the Court only suppressing the use of said evidence in the United States District Court for the District of New Mexico.*"

Whether evidence unlawfully obtained by federal officers or agents in violation of the Fourth Amendment is admissible in state criminal trials depends upon the state constitution, state statutes, decisions by its courts, or state rules of evidence. If not prohibited by one of these, its receipt in evidence does not violate any right guaranteed the accused by the federal Constitution, its laws, decisions of its courts, or its rules of evidence. But assuming without so deciding that the district court under its general equity power had the authority to provide for the

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[2]Byars v. United States, 273 U. S. 28;
Taylor v. Hudspeth, 113 F. (2d) 825;
United States v. Butler (10th Cir.), 156 F. (2d) 897;
Jaroshuk v. United States, 201 F. (2d) 52;
Rettich v. United States, 84 F. (2d) 118.

[3]Terrano v. State (Nevada), 91 P. (2d) 67;
State v. Gardner (Montana), 249 P. 574;
Com. v. Colpo, 98 Pa. Superior Ct., 460, Cert. Denied, 282 U. S. 863.

destruction of this evidence for the admitted purpose of preventing its use by the state and the power to enjoin Salter from testifying in the state action, if subpoenaed therein, we are of the view that it should not have done so.

While the facts in Stefanelli v. Minard, 342 U. S. 117, differ slightly from the facts before us in that there the plaintiff sought an injunction enjoining state officers from using evidence in a state prosecution which had been obtained in violation of the Federal Civil Rights Act, while here the evidence was obtained by a federal officer in violation of the Fourth Amendment, we think the reasoning of that case has force and applicability here. The court concluded that even if the power to enjoin the state officers might fairly and constitutionally be derived from the generality of language of the Act, to grant the relief would disregard the power of courts of equity to exercise discretion, when in the exercise of such discretion the balance is against the wisdom of using it. The court alluded to the delicate balance between state and federal judicial systems and how great care and discretion was necessary to preserve harmonious relationships between the two systems. The court reaffirmed the principle that "federal courts should refuse to intervene in State criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful search and seizure." Say what you will, the effect of the relief sought would make impossible the prosecution by the state of its action against appellant. That is the purpose and the only purpose sought to be accomplished by this proceeding and such an order would constitute an interference with the state judicial process.

Again assuming without deciding that the use of the void warrant and the evidence seized thereunder would violate some federal constitutional right of appellant, denying him the relief which he seeks would not leave him without remedy. He could urge that, as he should, in the

state trial[4] and, if denied relief there, could then appeal to the Supreme Court.

The quotation from the opinion in Silverthorne Lumber Company v. United States, 251 U.S. 385, that "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court *but that it shall not be used at all*" does not support appellant's theory. In that case documents were unlawfully seized. They were photostated and the originals were then returned by order of the court and the Government sought to use the photostatic copies and what the opinion means is that the Government could not use that evidence in any way.

AFFIRMED.

[4]See Douglas v. Jeanette, 319 U. S. 157.